

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY SESSION, 1996

**FILED**

August 28, 1996

C.C.A. NO. 02C01-9503-CC-00068  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
)  
Appellee, )  
)  
)  
VS. )  
)  
JERRY L. MATHEWS, )  
)  
Appellant. )

C.C.A. NO. 02C01-9503-CC-00068  
HARDEMAN COUNTY  
HON. JON KERRY BLACKWOOD  
PRESIDING JUDGE  
(Direct Appeal)

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OPINION FILED \_\_\_\_\_

AFFIRMED

JERRY L. SMITH, JUDGE

## OPINION

Appellant Jerry L. Mathews was convicted of a single count of aggravated assault arising out of a domestic dispute wherein Mathews shot and wounded his son. Appellant was also indicted for shooting at his two daughters; however, he was acquitted of these charges. For the single aggravated assault conviction, Appellant was sentenced as a Range I standard offender to three (3) years in the Department of Correction. The sentence was suspended except for 90 days which Appellant was ordered to serve.

In this appeal Appellant contends

1. that the three counts of the indictment charging Appellant with aggravated assault against each of his three children should have been severed and tried separately; and
2. that the trial court erred in failing to grant a judgment of acquittal based on a claim of self-defense.

We find both of these claims to be without merit and affirm the conviction.

The record reflects that on May 9, 1994, Appellant, who lived with his wife and adult children, was involved in an argument with his wife. When Appellant's son Thomas Mathews intervened, Appellant called his son outside. As the two men exited the house, Appellant attempted to hit Thomas and the pair fell off the porch. Thomas landed on top of Appellant and began hitting him. Appellant's two daughters tried to break up the fight and Thomas did, in fact, stop fighting. Although Thomas indicated that he no longer wanted to fight, Appellant continued to goad the younger man. Eventually, Appellant

pulled out a gun and shot his son in the back as Thomas attempted to run away.

After the shooting Appellant ran to the end of the driveway. When his two daughters asked him why he had shot their brother, Appellant shot at each one of them. He then ran to a neighbor's house where he explained he had gotten into a fight with his son and had shot the younger Mathews. The neighbor took Appellant to his sister's residence where the police came and obtained the weapon used in the shooting. Appellant told police the shooting had been in self-defense.

#### Severance of Offenses

Joinder of offenses is governed by Tenn. R. Crim. P. 8(a) and (b) which provide as follows:

(a) Mandatory Joinder of Offenses. -- Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within the jurisdiction of a single court. A defendant shall not be subject to separate trials for multiple offenses falling within this subsection unless they are severed pursuant to Rule 14.

(b) Permissive Joinder of Offenses. -- Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character.

Severance of offenses is controlled by Tenn. R. Crim. P. 14(b) which provides in pertinent part:

(b) Severance of Offenses

(1) If two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.

(2) If two or more offenses have been joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following conditions:

(i) If before trial on motion of the state or the defendant it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

(ii) If during trial with consent of the defendant it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether, in light of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Appellant maintains that the three counts of the indictment were joined pursuant to Rule 8(b), i.e. permissive joinder. He claims that the evidence of the alleged assault on the daughters would not be admissible in a trial for aggravated assault of the son, Thomas Mathews. Thus, Appellant maintains he was entitled to a severance pursuant to Rule 14(b)(1). It is clear however that the three aggravated assault charges arose out of the same criminal episode and that joinder of them was mandatory under Rule 8(a). Therefore Appellant was entitled to a severance only if the severance was necessary to "promote a fair determination of the defendant's guilt or innocence of each offense." Tenn. R. App. P. 14 (b)(2)(I).

The decision of whether to grant a severance of offenses is within the sound discretion of the trial judge and that decision will not be reversed unless it appears the defendant was prejudiced by the decision to try the charges together. State v. Wiseman, 643 S.W.2d 354, 362 (Tenn. Crim. App. 1982); State v. Porter, No. 03-C01-9308-CR-00261, 1994 WL 115863, at \*2 (Tenn.

Crim. App. Apr. 6, 1994), perm. to appeal denied, (Tenn. 1994). The fact that Appellant was convicted of only one count of a multi-count indictment is convincing evidence that he suffered no prejudice from the joinder of the offenses. Wiseman, 643 S.W.2d at 363. There is therefore no abuse of discretion found in this record with regard to the decision to deny a severance of offenses. This issue is without merit.

### Self-Defense

Appellant claims that the trial court should have granted him a judgment of acquittal based on his claim of self-defense. However, a judgment of acquittal is proper only if the trial judge concludes, after reviewing the evidence in the light most favorable to the State, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Culp, 891 S.W.2d 232, 235 (Tenn. Crim. App. 1994).

In the instant case, Appellant claimed that he shot his son in self-defense. However, the State's evidence was to the effect that Appellant started the fight, refused to break it off, and shot his son in the back. Under these circumstances, the question of self-defense became one for the jury to determine. See, Arterburn v. State, 391 S.W.2d 648, 653 (Tenn. 1965); State v. Clifton, 880 S.W.2d 737, 743 (Tenn. Crim. App. 1994). The trial judge did not err in allowing this conflicting testimony to go to the jury which, by its verdict, accredited the State's version of events. This issue is also without merit.

The judgment of conviction is affirmed in all respects.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOSEPH B. JONES, PRESIDING JUDGE

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GARY R. WADE, JUDGE